

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

77-4078

To be argued by
DAVID C. SHONKA

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SCM CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

On Petition to Review a Final Order of the
Federal Trade Commission

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

ISSUES PRESENTED

1. Is the Commission's power to terminate and prevent interlocking directorates among competing corporations limited in such a way that the Commission can only enter orders against offending directors but cannot prevent such corporations from reestablishing offending interlocks?

2. Assuming the Commission may lawfully order a corporation to cease and desist from maintaining interlocking directorates with competing corporations, is the Commission prohibited from entering a cease and desist order merely because the offending interlock is terminated and the corporation makes an unenforceable promise not to reappoint the director who resigned?

3. If the Commission settles its case against one interlocking corporation without adjudicating its liability, is the Commission limited by the terms of the consent order in fashioning a remedy against the other corporation which has been adjudicated as having violated the statute?

STATUTES INVOLVED

Relevant portions of the following statutes are set out in the addendum to this brief: Sections 1, 8, and 11(b) of the Clayton Act; and Section 5(a)(1) of the FTC Act.

STATEMENT OF THE CASE AND FACTS

Background

The Federal Trade Commission ("FTC" or "Commission") is an independent federal agency established pursuant to the FTC Act, 15 U.S.C. §§ 41 et seq. The Commission has authority, inter alia, to enforce Section 8 of the Clayton Act and Section 5 of the FTC Act. Section 8 of the Clayton Act provides, in part, that:

No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than \$1,000,000, * * * if such corporations are or shall have been * * * competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

Section 5(a)(1) of the FTC Act declares unlawful "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce * * * ."

SCM Corporation ("SCM") is a diversified industrial company that manufactures and distributes many products such as food, typewriters, business equipment, home appliances, paint, resins, chemicals and paper (A30, ¶ 4).¹/ In fiscal 1975, SCM's sales were \$1,287,000,000 (A62). Its capital, surplus and undivided profits aggregate more than \$1,000,000 (A13, ¶ 2; A24, ¶ 2).

Kraftco Corporation ("Kraftco") is primarily a food company (A30, ¶ 4). In 1974, Kraftco's sales approximated \$4,500,000,000 (Id.) Its capital, surplus and undivided profits aggregate more than \$1,000,000 (A13, ¶ 1; A18, ¶ 2).

SCM and Kraftco compete in the sale of certain food products. In fiscal 1975, SCM's sales of products in competition with Kraftco's sales were about \$83 million. Kraftco's sales in competition with SCM's sales were about \$258 million (A62-63).

Richard C. Bond ("Bond") joined the board of directors of Kraftco in 1957 and he has continued on the Kraftco board at all times relevant to this case (A31, ¶ 6). In 1967 SCM elected Bond to its board of directors and he continued on the SCM board until he resigned in August 1975, after the FTC issued its complaint in this case (Id.). Bond submitted his resignation to the SCM board on August 1, 1975, and the SCM board accepted the resignation at its regularly scheduled meeting held on August 21, 1975 (A31, ¶ 6; A50, ¶ 3).

¹/ References to ("A__") in this brief refer to pages in the Joint Appendix.

The Complaint

On June 17, 1975, the Federal Trade Commission issued a complaint against Kraftco, SCM, and Bond alleging, inter alia, that Bond's presence on the boards of directors of the two corporations "constitutes a violation of Section 8 of the Clayton Act and Section 5(a)(1) of the FTC Act" (A13-16). Attached to the complaint was a notice of contemplated relief. The notice specified the relief against both Kraftco and SCM that could be imposed if the Commission found Kraftco and SCM to be in violation of the law (A16). The notice stated that both corporations could be prohibited from having any common director with each other or with any competitor; that both corporations could be required to obtain reports from their directors and potential directors showing the products and services produced or sold by each corporation for which the director or potential director serves as a director; and that SCM and Kraftco could be required to submit compliance reports to the Commission (A16).

Kraftco, as did Bond, ultimately consented to the entry of a cease and desist order against it.²/ The

²/ After the complaint was issued, Bond resigned from the SCM board and consented to the entry of a cease and desist order prohibiting him, "so long as he remains a director of Kraftco," from resuming his position as a director of SCM or accepting or holding a position as a director of any corporation that competes with Kraftco. The order also directed him to file within 30 days a compliance report "setting forth the manner and form in which he has complied with this order" (A61).

order is more favorable to Kraftco than the order sought by the notice of contemplated relief (compare A16 with A141-43).³ / SCM answered the complaint and did not try to settle the case, describing a consent decree as "an alternative which is not now and has not, at any time, been acceptable to SCM * * * " (A35).

SCM and the Commission staff cross-moved for summary decision pursuant to Commission Rule 3.24, 16 CFR § 3.24. The arguments were heard by the Administrative Law Judge ("ALJ") (A169-242).⁴ / In both its written and oral presentations SCM stressed Bond's resignation and said that SCM would not reappoint Bond to its board of directors so long as Bond was a director of Kraftco or any corporation

³/ The agreement provided that Kraftco did not admit that it had violated the law (A140). Pursuant to the agreement the Commission entered a decision and order requiring Kraftco to cease and desist from having any interlocking directors with SCM Corporation so long as the two corporations "compete in the production or sale of any product" (A141). The order also requires Kraftco to obtain, for four years, written certification from each director or nominee that he is not also a director of any corporation that competes with Kraftco in the manufacture or sale of certain listed products, or any other product, where the sales of such other product exceed \$1,000,000 per year (A141-42). The order's final provision requires Kraftco to file compliance reports with the Commission for four years and, with certain exceptions, prohibits Kraftco for five years from permitting on its board of directors any director or nominee who fails to file a proper certification (A142-43).

⁴/ At the conclusion of the hearing, the ALJ urged the parties to enter into additional factual stipulations (A236-37). With the consent of the parties the ALJ subsequently ruled that he would base his initial decision upon the stipulation of facts, the complaint, the answers filed by Kraftco and SCM and upon the affidavits previously filed by complaint counsel and SCM in connection with their motions for summary decision (A117; and A13-16; A18-23; A24-27; A29-33; A37-57; and A62-116).

that competes with SCM. SCM did not say that it would not repeat the interlock by substituting another interlocking director for Bond, and SCM did not inform the Commission of any steps taken by SCM to ensure that it would not interlock with other competitors in the future. Rather, SCM argued that no relief should be entered against it because Section 8 should not be applied to corporations and SCM had not been caught violating Section 8 in the past. When asked by the ALJ how SCM's business would be affected by the contemplated relief, SCM's counsel was unable to point out any adverse impact other than a "feel[ing]" by the directors that "a reporting restriction" would be "a burden" (A186-87).

Initial Decision

On June 17, 1976, the ALJ filed an Initial Decision and Order against SCM (A118-37). The order generally corresponded to the provisions of the notice of contemplated relief (compare A16 with A136-37). The ALJ found that an illegal interlock existed between SCM and Kraftco by nature of Bond's position as a director of each corporation (A123-24); and the ALJ held that Section 8 of the Clayton Act does apply to corporations and that any other reading would render Section 8 unenforceable (A124-26).

The ALJ examined SCM's remaining arguments and found them to be without merit. He rejected SCM's argument that the case was insignificant and involved only de minimis competition finding that SCM's share, "\$83 million, is substantial by any measure" (A128); and he noted that no de minimis rule is even

likely to attach to Section 8 cases (A128, n. 17).⁵/ He also rejected SCM's argument that its rights had been violated by a modification in the Commission's enforcement procedures expressed in 40 Fed. Reg. 15235 (April 4, 1975) (A130, n. 21). In this regard he noted that SCM's primary argument seems to be that SCM had been denied "an opportunity to have its complaint and consent order entered simultaneously" (Id.).

The ALJ noted:

[SCM's] argument on this point is obscure, to say the least, since there is no indication that it wished to enter into a consent settlement at any stage of this proceeding. [Id.].⁶/

The ALJ likewise rejected SCM's assertion that an order is unnecessary in this case because SCM "may be caught again if it violates the law." SCM had argued that the names of its directors are a matter of public record and must be reported to the SEC and to the New York Stock Exchange (A132-33). The ALJ summarized his reasons for entering an order against SCM:

In this case there are no extenuating circumstances or other persuasive reasons for departing from overwhelming Commission precedent in favor of a cease and desist order. Here, as far as one can tell, nothing has been discontinued by SCM (Bond resigned

⁵/ SCM has abandoned this point on appeal (Pet. Br. p. 3), but insists on summarily arguing the issue anyway. No response to the argument is required other than to suggest that the Court read the statute and look at the ALJ's comment (A128, n. 17).

⁶/ Counsel for SCM described a consent decree as "an alternative which is not now and has not, at any time, been acceptable to SCM * * *" (A35).

of his own accord when he, too, was named as a respondent) and there is no basis for assuming that meaningful changes in procedures will be made unless respondent is ordered to do so. SCM has insisted all along that as a corporation it is not subject to the prohibitions of Section 8, and it has not even given adequate assurances of voluntary compliance with the law in the selection of directors other than Bond. Surely, whatever SCM did to comply with the law prior to complaint (assuming it did anything) was inadequate since it did not detect or prevent an unlawful interlock with its competitor Kraftco. In sum, I fail to see how the public interest is protected in any way unless SCM is compelled to take positive steps to prevent future recurrence of the same practice. [A134].

The Commission's Decision and Order

SCM appealed the ALJ's ruling and on January 11, 1977, the Commission issued its final decision and order (A145-64). Except for a few modifications of the ALJ's order, the Commission adopted the findings of fact and conclusions of law made by the ALJ in his initial decision (A145).⁷ / The Commission also supplemented the ALJ's initial decision with additional findings and conclusions.

The Commission rejected SCM's contention that only natural persons and not corporations can violate Section 8 of the Clayton Act. The Commission examined the legislative history of Section 8 and said it could find "no sign that this question [of non-corporate liability] was directly addressed during the course of Congressional debate over the Clayton Act" (A152, n. 4). The Commission concluded, however, that all doubt

⁷ / The Commission's order modified the ALJ's by limiting SCM's requirement to obtain certification from directors to a period of 5 years (A146-47). The ALJ's order had run in perpetuity (A161). There are other minor modifications, none of which is relevant to this appeal.

about the meaning of Section 8 dissolved upon a reading of Section 1, which defines a person to include a corporation, and Section 11, which directs the Commission to issue a cease and desist order against any person who violates Section 8 and to order such person to "rid itself" of the directors chosen in violation of Section 8 (A153-54). The Commission also pointed to lower court decisions finding corporations to be subject to Section 8, and noted that the interpretation urged by SCM would render Section 8 useless because sanctions against natural persons alone would be of a limited effect in preventing corporations from electing interlocking directors (A154-55).

The Commission also relied upon Section 5 of the FTC Act, which it noted is intended to reach acts and practices that offend the spirit and policy of the antitrust laws. The Commission concluded that SCM had violated Section 5 by electing to its board, and by keeping on its board, a director who was also a director of a competing corporation (A155-57).

Having found that SCM violated Section 8 of the Clayton Act and Section 5 of the FTC Act, the Commission discussed the necessity for the entry of an order against SCM. The Commission noted that the violation had continued for several years; that "[i]n 1975 SCM and Kraftco competed with respect to more than \$300 million worth of business, of which more than \$80 million were sales by SCM;" that SCM had not promised "to avoid other unlawful interlocks with Kraftco or anyone else;" and that SCM had not disclosed "what steps it will take or has taken to avoid interlocks"

(A158-59). The Commission concluded, "[u]nder these circumstances we find nothing to challenge the ALJ's conclusion that an order is appropriate here" (A159).

SUMMARY OF ARGUMENT

Section 8 of the Clayton Act provides that "no person at the same time shall be a director in any two or more corporations" under the circumstances that exist in the present case. SCM agrees that a violation of Section 8 occurred in the present case, but contends that the violation was committed by Bond and that a corporation cannot violate Section 8 of the Clayton Act. Such an interpretation ignores Section 11 of the Clayton Act; it ignores longstanding administrative interpretations of the Act; and it would render Section 8 meaningless by denying the Commission the power to enter orders against corporations that elect directors who interlock with competing corporations. SCM's interpretation of Section 8 is also inconsistent with the decisions of every lower federal court that has considered the issue.

SCM's action in electing Bond to its board of directors and in keeping him on its board also violated Section 5(a)(1) of the FTC Act which permits the Commission to declare unlawful those acts or practices which violate the spirit and policies underlying the antitrust laws. SCM elected Bond to its board of directors and, by doing so, it became a party to a violation of Section 8. Because SCM's conduct, at the minimum, violated the policy and spirit of Section 8, the Commission properly found that SCM violated Section 5 of the FTC Act.

Having found that SCM has violated the law, the Commission did not abuse its discretion in issuing an order against SCM.

In deciding to issue its order the Commission considered the nature and the extent of SCM's violation; the narrow assurance given by SCM that it would not reappoint Bond under present circumstances; and SMC's failure to inform the Commission of any steps that it has taken, or will take, to avoid unlawful interlocks in the future. Having evaluated the circumstances of the case, the Commission could properly decide that an order should be entered against SCM to prevent that diversified company from interlocking in the future with any of its numerous competitors.

The order issued by the Commission in this case is, in all respects, reasonable and proper. The order is authorized by law and it is intended to remedy the violation that occurred and prevent future violations of the same or similar nature. The Commission was not obligated to issue against SCM, an adjudged violator of Section 8 and Section 5, the same order that the Commission issued against Kraftco pursuant to settlement negotiations that resulted in Kraftco consenting to the issuance of an order without admitting any violation of law.

ARGUMENT

I. THE COMMISSION PROPERLY FOUND SCM'S CONDUCT TO BE UNLAWFUL

A. The Commission Properly Found That SCM Violated Section 8 Of The Clayton Act

SCM elected Bond to its board of directors in 1967 at a time when Bond had already been a member of the Kraftco board for ten years (A31). Although SCM concedes that Bond's presence on both boards of directors constituted a violation of Section 8 of the Clayton Act, SCM contends that it did

not violate the Clayton Act because it is not a natural person. Section 8 provides, in pertinent part, as follows:

No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than \$1,000,000, * * * if such corporations are or shall have been * * * competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

SCM does not argue with any of the operative facts concerning Section 8. Both SCM and Kraftco have capital, surplus, and undivided profits aggregating more than \$1,000,000.^{8/} Both are engaged in commerce; and both are competitors so situated in the market that the elimination of competition by agreement between them would violate the antitrust laws. Thus SCM's arguments rest upon the phrase "no person at the same time shall be a director * * * ."

To restrict Section 8 by interpreting it to mean that the Commission can proceed only against natural persons and not against corporations would be to ignore the prophylactic nature of Section 8. See United States v. Sears, Roebuck & Co., 111 F. Supp. 614, 616 (S.D.N.Y. 1953), holding that Section 8 was intended "to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates."

In rejecting SCM's restrictive reading of Section 8, the ALJ in his initial decision, which was adopted by the Commission,

^{8/} The statute requires that only one of the corporations meet the \$1,000,000 requirement. In this case both do.

observed that a restrictive reading of the statute would make the goals of Section 8 unachievable:

An interpretation of Sections 8 and 11 which allows corporations to seat interlocking directorates, reap the anti-competitive benefits, and then possibly appoint new interlocking directors after each violation is uncovered would transform a statute aimed at preventing full-blown antitrust violations into a license giving corporations multiple opportunities for achieving actual anticompetitive results. [A126].

In its opinion supplementing that of the ALJ, the Commission voiced similar concerns:

To absolve corporations of liability for sharing directors with competitors would, without question, severely undermine enforcement of the law, since any corporation could maintain such an interlocking directorate and, if detected, simply replace the ousted director with another interlocking board member, again without fear that detection could lead to anything more than the director's resignation. Sanctions against individuals alone are likely to be of limited effect, because there are hundreds of thousands of potential corporate directors at any given time. Sanctions against a much smaller number of corporations are far likelier to effectuate the purposes of Section 8, since an order against a corporation will prevent a far larger number of potential interlocks than one against an individual. [A154-55].

A restrictive reading of Section 8 would frustrate the ability of the FTC to issue orders that would halt the conduct prohibited by Section 8 and it would also frustrate the intention of Congress in forbidding interlocks.

Although common sense alone should tell us that if the goals of Section 8 are to be achieved the statute must be read to apply to corporations as well as natural persons, any doubt about the proper interpretation of the statute disappears upon reading Section 11 of the Clayton Act. Section 11(b)

of the Clayton Act provides that whenever the Commission finds that any person^{9/} has violated Section 8 or any other provision of the Act, the Commission "shall issue and cause to be served on such person an order requiring such person to cease and desist from such violation, and * * * rid itself of the directors chosen contrary to the provisions of [Section] 8 of the Act * * *" (emphasis added).^{10/}

Reading Section 8 and Section 11 of the Act in pari materia, the Commission correctly concluded that the Act not only prohibits individuals from holding directorships in competing corporations, but also prohibits competing corporations from having interlocking directors on their boards. The Commission succinctly summarized the meaning of Sections 8 and 11 when it concluded that "[n]eedless to say, only a corporation may 'rid itself' of directors" (A153). The Commission also stated:

Rather, Section 11 by its plain terms empowers the Commission to remedy the violations of Section 8 by entering an order to cease and desist against corporations, and this Section would be robbed of meaning by a construction that excluded corporations from the entities covered by Section 8. We believe, instead, that when Section 8 forbids the presence of a director on the boards of competing corporations, it speaks both to the director and to the competing corporations, and all may be accountable for ignoring its dictate. [A154].

^{9/} Section 1 of the act provides that the word "'person' whenever used in this act shall be deemed to include corporations * * *." 15 U.S.C. § 12.

^{10/} It is noteworthy that Section 11 contains the mandatory word "shall" and the conjunctive word "and." Thus the Commission, upon finding a violation of the law, shall issue an order to the "person" to cease and desist and rid itself of improper directors.

The Commission's decision likewise has substantial judicial support. The two lower federal court decisions that have discussed the issue have treated the Section as applicable to corporations.^{11/} In United States v. Sears, Roebuck & Co., supra, the government instituted a suit against two corporations and a director seeking an order compelling (1) the director to resign from either or both of his positions; and (2) either or both of the corporate defendants to accept the resignation and refrain from hiring the director in the future. The court found a violation of Section 8 and directed the parties to submit an appropriate order. 111 F.Supp. at 621. Subsequently the court entered a second order addressing the scope of the injunction and stating:

The violation of the statute was committed by the individual defendant in accepting membership on the Boards of Directors of of both corporations and by the latter in acquiescing therein over an extended period of years. [United States v. Sears, Roebuck & Co., CCH 1952-1953 Trade Cas. ¶ 67561 (S.D.N.Y. 1953)].

Five years later, the court was called upon to construe the decree that it had entered in that case. It held that its injunction, which was issued pursuant to the violation of Section 8, must be read broadly enough to preclude the corporation, from which the director had resigned, from appointing him to a position as a trustee of its pension fund, in which position he would have had an indirect opportunity to vote shares of stock of the company.

^{11/} The Supreme Court reserved judgment on the issue in United States v. W.T. Grant Co. 345 U.S. 629, 634 n. 9 (1953).

United States v. Sears, Roebuck & Co., 165 F.Supp. 356

(S.D.N.Y. 1958).

In United States v. Crocker National Corp., 422 F.Supp. 686 (N.D. Cal. 1976), ^{12/} the government sought to enjoin interlocking directorates between certain bank holding companies and banks, on the one hand, and certain insurance companies, on the other. On grounds that are not relevant to this case, the court found that Section 8 had not been violated because of a provision in Section 8 exempting banks from coverage under the statute. The court did, however, hold that it could order injunctive relief against the corporate defendants if its holding on the applicability of Section 8 should be reversed by the Court of Appeals:

Regardless of whether this contention [relating to corporate liability under Section 8] is correct, it is clear, and the defendants conceded at oral argument, that were this court to decide that injunctive relief were appropriate in these cases, this court could, if it chose to, enjoin the defendant corporations, as well as the individual defendants from further violating Section 8. See e.g., 15 U.S.C. § 25. [Id. at 705-06 (emphasis added)].

^{12/} In attempting to deal with the Crocker decision, SCM practically concedes the Section 8 issue when it says: "A more reasonable construction is that a corporation, although not itself in violation of Section 8, may be subject to a Section 11 order to 'rid itself' of an offending director if that director refuses voluntarily to resign" (Pet. at 23). To support its "more reasonable construction" SCM cites a law review article, Kramer, Interlocking Directorships and the Clayton Act After 35 Years, 59 Yale L.J. 1266, 1268 n. 12 (1950). Neither the article nor the Crocker decision suggests that Section 11 becomes operative only if a director refuses to resign. Furthermore, because SCM is saying that the Commission can, under Section 11, issue a cease and desist order against a corporation, SCM's discussion of Section 8 is academic and the only remaining issue in this case is whether the Commission's order is a legally "allowable" one. See Butz v. Glover Livestock Comm'n. Co., Inc., 411 U.S. 182, 189 (1973), quoting Jacob Siegel Co. v. FTC, 327 U.S. 608, 612 (1946).

The Crocker ruling thus shows that a corporation may properly be enjoined from violating Section 8.

The above decisions are likewise consistent with longstanding administrative interpretations of Section 8.^{13/} Recent F.T.C. actions show that the Commission has continued to enforce Section 8 against corporations. See e.g., Chrysler Corp., 83 F.T.C. 1205 (1974). Where, as here, there has been a consistent history of an agency interpreting a statute that the agency is charged with enforcing, that interpretation is entitled to great deference and should not be lightly set aside.^{14/} Stanley Works v. FTC, 469 F.2d 498, 505 (2d Cir. 1972), cert. denied, 412 U.S. 928 (1973). See FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385, (1965); Udall v. Tallman, 380 U.S. 1, 16 (1965); Resort Car Rental System, Inc. v. FTC, 518 F.2d 962, 963 (9th Cir. 1975).

In all the briefs submitted by SCM to the Commission and to this Court, SCM has not produced a single clear statement by any person associated with the passage of the Clayton Act that would indicate that the Act was intended to apply

^{13/} The stipulation entered into between SCM and complaint counsel includes an appendix summarizing FTC investigations and proceedings under Section 8 since 1960. These summaries show that corporations have consistently been respondents in Section 3 investigations. See e.g., A80, A83, A84, A85.

^{14/} Thus the Commission in its final decision commented:

[T]he imposition of corporate liability is in accord with decades of Justice Department and Federal Trade Commission enforcement of the Clayton Act, via voluntary action, consent agreements, and litigation. [A154].

to natural persons only and not to corporations.^{15/} The ambiguities conjured up by SCM should not become instruments by which the purpose of Section 8 is undermined and the Commission's ability to enforce the statute is frustrated.

B. The Commission Properly Found That SCM
Violated Section 5 of the FTC Act.

The Commission's finding that SCM violated Section 5 of the FTC Act provides an additional and alternative basis upon which this Court should affirm the Commission's decision.^{16/} Section 5(a)(1) provides:

Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful. [15 U.S.C. (Supp. V) § 45].

That Section means that the Commission has broad discretion to declare unlawful not only any acts or practices that violate the spirit and policy, as well as the letter, of the antitrust laws, but also any acts or practices that the Commission finds merely to be unfair:

"[L]egislative and judicial authorities alike convince us that the Federal Trade Commission

^{15/} The Commission did, moreover, review the legislative history of Sections 8 and 11 and concluded that it could find nothing in the history that would support the interpretations suggested by SCM; indeed, the Commission cited language suggesting contrary interpretations as, for instance, a statement in the House Reports that a two year grace period was being allowed under the statute "in order that the corporations affected may have ample time to readjust their boards of directors * * *," [A152, citing, H. R. Rep. No. 627, pt. 1, 63d Cong., 2d Sess. 18 (1914)].

^{16/} This Court has recognized that a violation of § 5 is not necessarily a violation of other antitrust laws, but a violation of an antitrust law "is also a violation of § 5." Stanley Works v. FTC, 469 F.2d 498, 499 n. 2 (2d Cir. 1972), cert. denied, 412 U.S. 928 (1973).

does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws." [FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972)].

See also FTC v. Brown Shoe Co., Inc., 384 U.S. 316, 320-22 (1966); Atlantic Ref. Co. v. FTC, 381 U.S. 357, 369-70 (1965).

This Court has also found that Section 5 of the FTC Act may be used by the Commission to prohibit actions that are not expressly forbidden by another statute. In Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962), this Court upheld the Commission's finding that Grand Union, a buyer, had violated Section 5 by soliciting and receiving payments from suppliers in violation of Section 2(d) of the Robinson-Patman Act despite the fact that Section 2(d) did not expressly apply to buyers but only to sellers. See also R. H. Macy & Co., Inc. v. FTC, 326 F.2d 445 (2d Cir. 1964); American News Co. v. FTC, 300 F.2d 104 (2d Cir.), cert. denied, 371 U.S. 824 (1962). If Section 5 may properly be applied to buyers when the Robinson-Patman Act speaks only of sellers, then Section 5 may properly be applied to corporations, such as SCM, when the Clayton Act speaks of directors.^{17/}

^{17/} In Grand Union the Court noted that Section 2(d) "is aimed only at sellers; it makes no mention of buyers, even though it is difficult to conceive of a transaction violating § 2(d) which did not involve a buyer as well as a seller" 300 F.2d at 94. Here, it is impossible to conceive of a violation of Section 8 which does not involve a corporation as well as its director.

To support its argument that Section 5 does not apply to this case, SCM: (1) attempts unsuccessfully to distinguish the Grand Union case; (2) relies upon a Supreme Court decision that predates the original enactment of the FTC Act; and (3) extensively quotes a law review article that was written by "one of the lead attorneys representing insurance company defendants in the landmark Bank America and Crocker interlock cases * * * ." 18/ SCM's dispassionate "commentator" generally suggests that Section 5 of the FTC Act should not be applied either to his clients or to those, like SCM, who are in the same position as his clients.

The facts in the present case are not in dispute. SCM elected Bond to its board of directors and thereby became a party to a violation of Section 8 of the Clayton Act. Even if Section 8 does not apply to corporations, SCM nonetheless violated the spirit and the policy of Section 8. The Commission therefore properly concluded that SCM had violated Section 5 of the Clayton Act:

Assuming arguendo that illegally interlocked corporations must be allowed to escape liability through the allegedly porous wording of Section 8, no better illustration of a practice offensive

18/ Wilson, Unlocking Interlocks: The On-Again, Off-Again Saga of Section 8 of the Clayton Act, 45 Antitrust L.J. 316, 317 (1976). By quoting Wilson, SCM has suggested that a violation of Section 5 cannot be found without a showing of actual competitive harm. Such is not and has never been the law. See FTC v. Algoma Lumber Co., 291 U.S. 67, 81 (1934).

to the spirit and policy of the antitrust laws if not their letter can be imagined than the employment and retention by a corporation of a director whose presence on board itself violates the law. Application of Section 5 in such a case does no more than effectuate the clear purpose of the Clayton Act. [A155].

The Commission's finding that SCM violated Section 5 of the Clayton Act is entitled to great deference and must be upheld. See Albermarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975); Udall v. Tallman, 380 U.S. 1, 16 (1965); Stanley Works v. FTC, supra, 469 F.2d at 505.

II. THE COMMISSION'S ORDER IS PROPER

A. The FTC Did Not Abuse Its Discretion In Entering An Order Against SCM

To the extent SCM challenges the remedy selected by the Commission to correct SCM's violation, the Court's review is narrowly restricted. Both Section 11 of the Clayton Act and Section 5 of the FTC Act have vested in the Commission the power to require an offender "to cease and desist from [violating] the law." These two sections permit the Commission to order a corporation to do whatever the Commission believes is necessary to ensure that illegal conduct ceases and that future violations do not recur. The only proper issue before this Court concerning remedies is whether the FTC has made "an allowable judgment in [its] choice of remedies." Butz v. Glover Livestock Comm'n Co., Inc., 411 U.S. 182, 189 (1973), quoting Jacob Siegel Co. v. FTC, 327 U.S. 608, 612 (1946). In Siegel the Court held "that courts will not interfere"

with the choice of remedy "except where the remedy selected has no reasonable relation to the unlawful practices found to exist." 327 U.S. at 613.

Throughout the administrative proceedings SCM strenuously argued that no order should be entered against it because: (1) it had not been caught violating Section 8 of the Clayton Act previously; (2) Bond resigned from SCM's board of directors; and (3) SCM would not re-elect Bond to its board of directors so long as Bond continued to serve as a director of Kraftco or any corporation that competes with SCM. The Commission carefully considered SCM's reasons and found them to be insufficient.

In entering its order against SCM, the Commission: (1) observed that the interlock had continued for several years and was terminated only after the Commission had acted; (2) stated that, in 1975, competition between Kraftco and SCM involved more than \$300,000,000 in Kraftco sales and more than \$80,000,000 in SCM sales; (3) noted the narrow, and unenforceable, promise that SCM had made concerning Bond and its failure to make any promise concerning other unlawful interlocks; and (4) discussed SCM's failure to inform the Commission of any corrective steps it had taken or would take (A158-59). The Commission noted:

SCM argues there is nothing which requires it to announce what steps it will take or has taken to avoid interlocks. [Record at 490]. We completely agree, and if those undisclosed procedures it uses to comply with the law had proven adequate to prevent this violation their identity would be no concern of ours. However, since a violation involving a large amount of commerce did occur and persist for several years, and since the record discloses nothing of the procedures used by respondent to prevent such occurrences, we are hard-pressed

to see what other conclusion can be reached than that SCM's procedures are inadequate to insure nonrepetition of future violations. [A159 n. 6].

The Commission's decision to enter an order against SCM may not be set aside unless SCM can "demonstrate that there [is] no reasonable basis for the [Commission's] decision." United States v. W.T. Grant Co., 345 U.S. 629, 634 (1953). ^{19/} In Grant the United States instituted

^{19/} SCM attempts to argue that the Grant case assigns to the Commission staff the burden of proving that SCM intends to repeat its violation of Section 8 before a cease and desist order may issue. To make its argument SCM points to language in Grant saying that the moving party must show "some cognizable danger of recurrent violation." 345 U.S. at 630. To say that this language imposes such a burden of proof upon the Commission staff is to ignore the context of the Court's statement. When the Supreme Court made the statement concerning "cognizable danger," it was discussing whether the district court had abused its discretion in basing a judgment for the defendants upon unopposed affidavits which government counsel had conceded were truthful. The Supreme Court summarized its discussion of the record by saying "In these circumstances, the District Judge could decide that there was no significant threat of future violation and that there was no factual dispute about the existence of such a threat" (345 U.S. at 635, emphasis added). Thus the Court was not assigning burdens, but merely discussing whether, on the record before it, the district court had abused its discretion.

Recent cases show that, where a violation of the law has been shown, the burden is upon the defendant to show that injunctive relief is unnecessary. In United States v. Concentrated Phosphate Export Ass'n., Inc., 393 U.S. 199 (1968), the Court rejected a mootness argument and, citing Grant, 345 U.S. at 633-36, held: "of course it is still open to appellees to show, on remand, that the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary" 393 U.S. at 203. In this case a violation of the law has been shown. SCM failed to make a satisfactory showing either that there are mitigating factors or that it intends to comply fully with the law in the future.

an action in federal district court under Section 15 of the Clayton Act to enjoin the defendants from violating Section 8 of the Clayton Act. In that case the defendant/director resigned from several boards and all defendants filed affidavits disclosing the resignations and denying any intention to resume the interlocks. Id. at 630, 635. The government did not file opposing affidavits and at oral argument counsel stated that the government did not question the truth of the defendants' affidavits. Id. The district court treated the defendants' motion to dismiss as a motion for summary judgment and granted judgment for the defendants. On review the Supreme Court said that the issue before it was whether the district court judge had abused his discretion in granting judgment for the defendants. The Supreme Court held that it would not set aside the district court's decision unless it could find "no reasonable basis" for the decision, Id. at 634. In discussing the district court's discretion the Court said:

The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance, and, in some cases, the character of the past violations.

* * * * *

19/ (cont'd)

Furthermore, it is worth noting that SCM has not pointed to a single case in which a court has set aside a Commission order merely because the FTC respondent had promised to stop violating the law. In this regard see Coro, Inc. v. FTC, 338 F.2d 149, 153-54 (1st Cir. 1964), cert. denied, 380 U.S. 954 (1965). In that case the Court affirmed an FTC order entered after the respondent had, before the Commission issued its complaint, left the line of business in which the violations had occurred.

* * * How much contrition should be expected of a defendant is hard for us to say. This surely is a question better addressed to the discretion of the trial court. The same can be said for the limited disclaimer of future intent. [Id. at 633-34].

Just as it imposed a heavy burden on one challenging the district court's decision about remedies to show an abuse of discretion, Grant indicates that there is a heavy burden on SCM to show that the Commission abused its broad remedial discretion. See United States v. Newmont Mining Co. CCH 1964 Trade Cas. ¶ 71030 (S.D.N.Y.). In addition SCM has relied upon Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975), and SEC v. Management Dynamics, Inc., 515 F.2d 801 (2d Cir. 1975). These cases are inapposite to the issues raised in this case and they merit discussion only because SCM has made so much of them. Rondeau was a private action based upon a technical violation of the securities laws. In affirming the district court's denial of injunctive relief, the Supreme Court noted that the private suit was "not expressly authorized by * * * statute" and that the petitioner had not shown any injury. The Court held "the questions of liability and relief are separate in private actions under the securities laws, and * * * the latter is to be determined according to traditional principles." 422 U.S. at 64.

In SEC v. Management Dynamics, Inc., supra, this Court dealt with a statute that "provides for injunctive relief only when a person 'is engaged or about to engage' in illegal acts." 515 F.2 at 807. Thus, the Court was dealing with a statute that is significantly different from either the FTC Act or the Clayton Act, which permit the Commission to issue cease and desist orders upon finding that a person has committed illegal acts, even if the illegal conduct has ceased. E.g., The Great Atlantic & Pacific Tea

Co., Inc., v. FTC, No. 76-4179 (2d Cir. June 21, 1977) slip op. at 4318; Fedders Corp. v. FTC, 529 F.2d 1398, 1403 (2d Cir.), cert. denied, 429 U.S. 818 (1976); William H. Rorer, Inc. v. FTC, 374 F.2d 622, 625-26 (2d Cir. 1967); Coro, Inc. v. FTC, 338 F.2d 149, 153-54 (1st Cir. 1964), cert. denied, 380 U.S. 954 (1965). Moreover, it is significant that in Management Dynamics this Court observed that "the commission of past illegal conduct is highly suggestive of the likelihood of future violations" (citations omitted) 515 F.2d at 807.

In the present case the Commission has examined the bona fides of SCM's expressed intention to comply and found the expressed intent to be too limited.^{20/} The Commission also stated that it could not assess the effectiveness of SCM's discontinuance because SCM had not disclosed to the Commission any steps taken by SCM to prevent future violations. The Commission likewise considered the character of SCM's violation and found that "[i]t was, moreover, not an insignificant, trivial, or technical infraction" (A158). SCM cannot demonstrate that there is "no reasonable basis" for the Commission's decision.

B. The Commission's Final Order Is Reasonably
Related To SCM's Unlawful Conduct

The final order issued by the Commission consists of four operative paragraphs. The first paragraph forbids SCM from having interlocking directors with competing corporations

^{20/} In any event, a respondent in an FTC proceeding is not entitled to have a case disposed of on the basis of a mere assurance of voluntary compliance that cannot be enforced. FTC v. Jantzen, Inc., 383 F.2d 981, 983 (9th Cir. 1967); Coro, Inc. v. FTC, supra, 338 F.2d at 152.

in the future.^{21/} The first paragraph also forbids SCM to appoint to its board any person who fails to submit the statements required by the second paragraph of the order. The second paragraph establishes a vehicle for monitoring and implementing compliance by requiring directors and nominees for directorships to provide a list of the products manufactured by companies for which they already are directors. The paragraph requires the reports to be obtained for five years. Paragraph three directs SCM to file with the Commission a written compliance report within 45 days after the effective date of the order and annually for a period of ten years. The statements furnished by the directors under paragraph two are to be attached to the compliance reports during the five years that the statements are obtained. Paragraph four of the order requires SCM to notify the Commission "prior to any change in the corporation * * * which may affect compliance obligations arising out of this order." (A146-47).

The order imposed upon SCM is a narrow one designed to assist SCM in complying with Section 8 of the Clayton Act and Section 5 of the FTC Act. SCM was adjudged to have violated the Acts by having on its board of directors a person who served as a director of a competing corporation. The order is therefore reasonably related to SCM's offense and must be

^{21/} SCM argues that Kraftco was not subjected to a similar prohibition. That argument elevates form over substance and is factually wrong. The prohibition against Kraftco is merely expressed in different language than the prohibition against SCM. The SCM order says SCM cannot have director interlocks with competing corporations. The Kraftco consent order says Kraftco may not have on its board any director who fails to certify to Kraftco that other corporations, of which he is a director, do not compete with Kraftco regarding Kraftco's primary product lines. (A141-42, A146).

upheld. FTC v. National Lead Co., 352 U.S. 419 (1957); FTC v. Ruberoid Co., 343 U.S. 470 (1952); Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946). In the Siegel case, the Court observed that the FTC "has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist."

327 U.S. at 613. Likewise, in FTC v. Ruberoid Co., supra, 343 U.S. at 473 (1952), the Court said:

If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.

See also Fedders Corp. v. FTC, supra, 529 F.2d at 1401-02.

C. The Fact That The Litigated Order Against SCM Maybe More Burdensome Than The Consent Order Entered In A Settlement With Kraftco Is Not A Ground For Vacating Or Modifying The SCM Order.

SCM argues that the Commission has applied the law in an uneven manner and that SCM is therefore entitled to relief from the Commission's order because it is the victim of unjust discrimination. SCM claims that an element in the allegedly discriminatory treatment of SCM lies in SCM's alleged lack of an opportunity to settle the matter informally. SCM alternatively argues that, assuming it should be subject to an order, the order should be no broader than the order issued by the Commission against Kraftco.

These arguments are without merit. Under all applicable decisional authority the only issue before this Court is whether the Commission's final order is an allowable one. Butz v. Glover Livestock Comm'n Co., Inc., supra, 411 U.S. at 189. If a court finds

that the Commission is authorized to issue an order and if a court finds that the order bears a reasonable relationship to the offense found to have existed, the court's inquiry should end.^{22/}

SCM's argument with respect to its alleged lack of an opportunity to settle this matter continues to be, as it was before the ALJ "obscure" (A130) and is, in any event, without merit. SCM objects to the fact that as the result of a routine change in the Commission's Rules of Practice (applicable to all respondents in Commission cases, including SCM's co-respondents Kraftco and Bond) SCM was not accorded an opportunity to settle this matter prior to the filing of a formal complaint. But clearly there was nothing improper in the Commission's change of its Rules of Practice ^{23/} and SCM was, like

^{22/} See Part II, B, supra.

^{23/} Under the old rules, an informal complaint could, in appropriate cases, be issued under Part II of the Commission's rules and the respondent would have 30 days in which to enter into a consent decree before a formal complaint would be issued under Part III. See 40 Fed. Reg. 15235. The Commission modified its rules in April, 1975 and issued its complaint against SCM on June 17, 1975 (A14). Since the complaint was issued more than 30 days after the rule change, SCM does not even have a colorable claim that the old Part II procedure should have been applied in this case. And even if SCM could claim that the Part II procedure was somehow still in effect in June, 1975, SCM would not have had an absolute right under those rules to have a cease and desist order entered against it informally because the old rules were expressed in optional terms. See 40 Fed. Reg. 15235. See also FTC v. Jantzen, Inc., supra, 383 F.2d at 983; Coro, Inc. v. FTC, supra, 338 F.2d at 152.

Kraftco and Bond, accorded a full opportunity to settle this matter by consent order after the complaint had issued. The rules change merely altered the time at which SCM's opportunity to settle by consent order was accorded. Settlement of this matter was, however, "an alternative which is not now and has not, at any time, been acceptable to SCM" (A35) and SCM should not now be heard to argue that it has been prejudiced by the imaginary denial of an opportunity of which it never desired to avail itself.^{24/}

SCM argues that the Commission's routine application of its procedural rules rises to a denial of equal protection because "no effort was made to explain why SCM should be singled out from all other corporations that were investigated for a possible Section 8 violation since at least 1960 * * *." (Pet. Br. 35). If SCM is arguing that it was "singled out" in being denied the procedures available under outdated Rules of Practice the simple answer is, as stated above, that such revised Rules were applicable to all respondents from the time enacted and the changed denied SCM nothing of substance and nothing

^{24/} Particularly misplaced is SCM's suggestion (Pet. Br. 35) that the lack of a pre-complaint settlement opportunity prejudiced SCM because the "extra time and money involved in issuing a formal complaint, and ultimately in litigating this proceeding was charged against SCM in the form of a more onerous consent order." SCM had full opportunity to obtain whatever advantages it believes respondent Kraftco had by negotiating a consent settlement.

of value to it. To analogize a change in timing of a law violator's chance to settle to the denial of equal educational or housing opportunities described in Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), and by this Court in Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968), is a gross distortion of the facts of this case.

To the extent that SCM may be suggesting that it should not be subjected to an order because the Commission has not yet instituted proceedings against all violators, the law is to the contrary. The first point to be observed, however, is that since the Commission's adoption of the enforcement strategy of seeking cease and desist orders against Section 8 violators, it has obtained many such orders, of which that entered against SCM is only one (All6). The courts have moreover repeatedly and consistently held that the Commission has great discretion in choosing among even identically situated violators those that it will pursue and in choosing the manner and means by which it will pursue them. See FTC v. Universal-Rundle Corp., 387 U.S. 244, 251 (1967); Moog Indus., Inc. v. FTC, 355 U.S. 411, 413 (1958); Rabiner & Jontow, Inc. v. FTC, 386 F.2d 667 (2d Cir. 1967), cert. denied, 390 U.S. 1004 (1968). The Supreme Court clearly articulated the discretionary enforcement powers of the Commission when

it stated in Moog Industries v. FTC, supra, 355 U.S.
at 413:

* * * [W]hether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the administrative agency. * * * Furthermore, the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically.

There is likewise no basis upon which SCM can argue that it, adjudged through litigation to be a violator of Section 8 of the Clayton Act and Section 5 of the FTC Act, should--as a matter of law--be subjected to the same treatment as Kraftco, a company that was not adjudged a violator and that settled its differences with the Commission without litigation by the entry of a consent cease and desist order.

Contrary to SCM's assertions, a consent order does not establish the standard by which all future agency sanctions for similar law violations are to be judged. In United Van Lines, Inc. v. United States, 545 F.2d 613 (8th Cir. 1976), a motor carrier argued that the Interstate Commerce Commission, by accepting a consent decree in a related case, "'quite firmly committed itself' to and 'established a standard for compliance'" with an ICC rule. 545 F.2d at 618. In upholding an ICC cease and desist order and suspension of some of the carrier's operating authorities, the court held:

[United Van Lines'] argument grants unwarranted breadth to the precedential nature of a consent decree. Such a decree is effectively an agreement between the parties to the action to terminate that specific litigation under certain stipulated conditions. [Id. at 618].^{25/}

In rejecting United's argument, the court held that the ICC is not obligated to impose uniform sanctions in cases concerning similar violations of the law. See also Butz v. Glover Livestock Comm'n Co., Inc., supra, 411 U.S. at 187, 188 (1973).^{26/}

Likewise, SCM may not properly rely upon Ford Motor Co. v. FTC, 547 F.2d 954 (6th Cir. 1976), cert. denied, 45 U.S.L.W. 3749 (May 16, 1977).^{27/} In that case

^{25/} "A consent order, like a plea bargain, normally embodies a compromise." United States v. Armour & Co., 402 U.S. 672, 681-82 (1971); United States v. ITT Continental Baking Co., 420 U.S. 233, 235-37 (1975).

^{26/} In Glover Livestock the Supreme Court held that "mere unevenness in the application of [a] sanction does not render its application in a particular case 'unwarranted in law.'" 411 U.S. at 188.

^{27/} The language from the first Ford opinion appearing at 1976-1 Trade Cases ¶ 60938, at 69117 which SCM relies upon (Pet. Br. 46) was deleted by the court on rehearing, 1976-2 Trade Cases ¶ 61218, at 70575. Even the first opinion, before it was modified on rehearing, explained that the holding (now vacated) was limited to an FTC consent order where there had been a major change of circumstance after submission of the consent order to the Commission and before the Commission's final acceptance of the consent order.

the Sixth Circuit suggested that in a proper case, a court might stay a Commission order and order a remand so that the Commission could examine alleged disparities between the cease and desist order before the court and an order issued against a major competitor. See also Johnson Prods. Co. v. FTC, 549 F.2d 35 (7th Cir. 1977) (remanding the case after the Commission itself extended to the petitioner an invitation to apply for reopening of the order.) Both Ford and Johnson recognize, however, that mere disparity between orders is not sufficient to warrant consideration of such a remand. There must be a showing that substantial competitive injury would result if the Commission's order were to go into effect and that the Commission's role in creating the competitive disadvantage amounted to a gross abuse of discretion. See also FTC v. Universal-Rundle Corp., supra, 387 U.S. at 251; Moog Indus. Inc., v. FTC, supra, 355 U.S. at 414. SCM does not contend that the somewhat more "burdensome" requirements of the order against it as compared to the Kraftco order are so substantial that competitive injury will result.^{28/} Nor has it shown that the Commission's

^{28/} This Court's decision in Marco Sales Co. v. FTC, 453 F.2d 1 (2d Cir. 1971), relied upon by SCM (Pet. Br. 44-45) is clearly inapposite. In Marco this Court remanded the case because the Commission failed to address the question why Marco's practices should be banned outright (as provided in the Commission's order) whereas an industry-wide FTC rule permitted the same practice to be engaged in by others under prescribed conditions. There is no analogous situation involved here and, of course, the Commission explained why it believed the order against SCM was necessary despite the somewhat less burdensome consent order entered against Kraftco (A158-60).

formulation of the order against SCM amounted to an abuse of discretion.

Thus, it is clear that: (1) consent decrees have no precedential value for adjudicated decrees; (2) an agency need not apply the same sanction in every case involving similar violations; and (3) the order entered against SCM is generally the same order outlined in the notice of contemplated relief. ^{29/} When one keeps these facts in mind, one sees the weakness of SCM's argument that it has been "punished" for exercising its right to a hearing before the Commission. SCM has not been punished; the Commission has merely fashioned an order in response to SCM's violation of the law and SCM's failure to convince the Commission that SCM has reformed.

SCM has therefore misplaced its reliance upon cases such as North Carolina v. Pearce, 395 U.S. 711 (1969) and Dan J. Sheehan Co. v. Occupational Safety and Health Review Comm., 520 F.2d 1036 (5th Cir. 1975), cert. denied, 424 U.S. 965 (1976). In Pearce, the Supreme Court held that, upon retrial, a trial court must justify any increase in a sentence imposed upon a criminal defendant who has successfully exercised his appeals rights and succeeded in having his first conviction set aside. In Sheehan the Court relied upon the Pearce case in holding that "a system that imposes a more severe

^{29/} Compare A16 with A146-47.

penalty following a successful appeal is not per se constitutionally infirm" 520 F.2d at 1040. ^{30/} In the present case SCM has not been exposed to greater sanctions by appealing after once having been adjudged a violator; and, in fact, SCM has been subjected to sanctions that are less onerous than those to which it was originally exposed in the notice of contemplated relief. ^{31/} Furthermore, there is no constitutional bar to imposing a fully penalty upon a criminal defendant who litigates although the penalty thus imposed is more severe than one imposed upon a co-defendant who plea bargains. Pearce, and related cases cited by SCM, are limited to cases in which a party is

^{30/} In its brief to this Court SCM quoted from Sheehan the two sentences proceeding the sentence quoted in the text accompanying this footnote, but SCM neglected to add the critical sentence that explains the whole paragraph (Pet. Br. 43-44). The relevant text reads as follows:

The question then becomes whether the threat of increased penalties after employer-initiated review violates the employer's due process rights under the Fifth Amendment. Since this precise question has not been decided by this court, we take our guidance from developments in the criminal law area. The decisions of the United States Supreme Court have repeatedly stressed that a system that allows the imposition of a more severe penalty following a successful appeal is not per se constitutionally infirm. [520 F.2d at 1040 (citing, inter alia, Pearce, supra)].

^{31/} Compare A16 with A146-47; and compare A136-37 with A146-47 and 161-62.

penalized for exercising appellate remedies. The cases do not concern situations in which parties demand and receive trials.

In its final decision and order, the Commission described the differences between Kraftco and SCM and held that a stiffer order against SCM was warranted under the circumstances of the case:

An unstated premise of [SCM's] argument is, of course, that Kraftco, the consent settlor, may be assumed to have violated the law in equal measure as SCM, so that the remedy appropriate to Kraftco may somehow be the test of that appropriate to SCM. In fact, of course, Kraftco in settling admitted no legal liability, and gave up its opportunity to defend the charges against it and to present any evidence which might tend to mitigate the force of incriminating evidence. In light of this it is somewhat presumptuous for this Commission or SCM to assume that Kraftco's order provides an absolute measure of what would satisfy the public interest with respect to SCM.

The "public interest" on behalf of which this Commission is enjoined to act comprehends not only the justness with which particular disputes are resolved, but the speed and efficiency with which resolutions are obtained as well. The public unquestionably has a strong interest in the ability of its law enforcement institutions to resolve controversies swiftly and at minimum cost. Every party accused of wrongdoing in our system has the right to insist that the government prove the charges against it, but if every accused were to exercise that right to its fullest extent the administration of justice would be seriously retarded if not actually imperiled. As a result, we believe the Commission does not act improperly when in considering acceptance of a proffered consent order, it weighs as part of the requisite public interest, the savings in time, money, and uncertainty which the settlement will provide.

It follows from this that the terms of a consent settlement may, consistently with the

public interest, be less stringent than the corresponding order obtained through litigation, and conversely, that an order entered after litigation may properly be more stringent than an order entered after settlement. [A163].

There exists no basis upon which SCM can demand that this Court order the Commission to treat all adjudged violators the same way that the Commission treats all parties who enter into consent agreements with the Commission. Cf., Moog Industries v. FTC, supra.

When SCM's arguments of discriminatory Commission conduct are analyzed both in terms of the actual facts surrounding this case and in terms of applicable legal principles, the inevitable conclusion is that SCM's arguments are without merit and cannot support an argument that the Commission's actions have been erroneous.

SCM's arguments must not detract from the fact that SCM recruited, selected, nominated, and elected Bond to its board of directors and retained him on its board until he resigned after the Commission issued a complaint in this matter. At all times Bond was a member of the board of directors of a competitor of SCM and both SCM and the competitor are engaged in commerce and have capital, surplus, and undivided profits exceeding \$1,000,000. The Commission adjudged SCM a violator of Section 8 of the Clayton Act and Section 5 of the FTC Act and the Commission fashioned an order narrowly tailored to fit the facts of SCM's violation and to ensure that SCM does not again have improper interlocking directors with any of the many corporations with which SCM, a diversified conglomerate, competes.

CONCLUSION

In all respects, the Commission's decision and order are in accordance with law and should be sustained. Accordingly, the Commission's order should be affirmed and enforced by this Court. 32/

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July 1977

32/ "To the extent that the order of the Commission is affirmed, the Court shall thereby issue its own order commanding obedience to the terms of such order of the Commission." 15 U.S.C. § 45(c). See Rabiner & Jontow, Inc. v. FTC, supra, 386 F.2d at 671-72.



ADDENDUM

The Clayton Act

Section 1, 15 U.S.C. § 12:

* * *

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Section 8, 15 U.S.C. § 19:

* * *

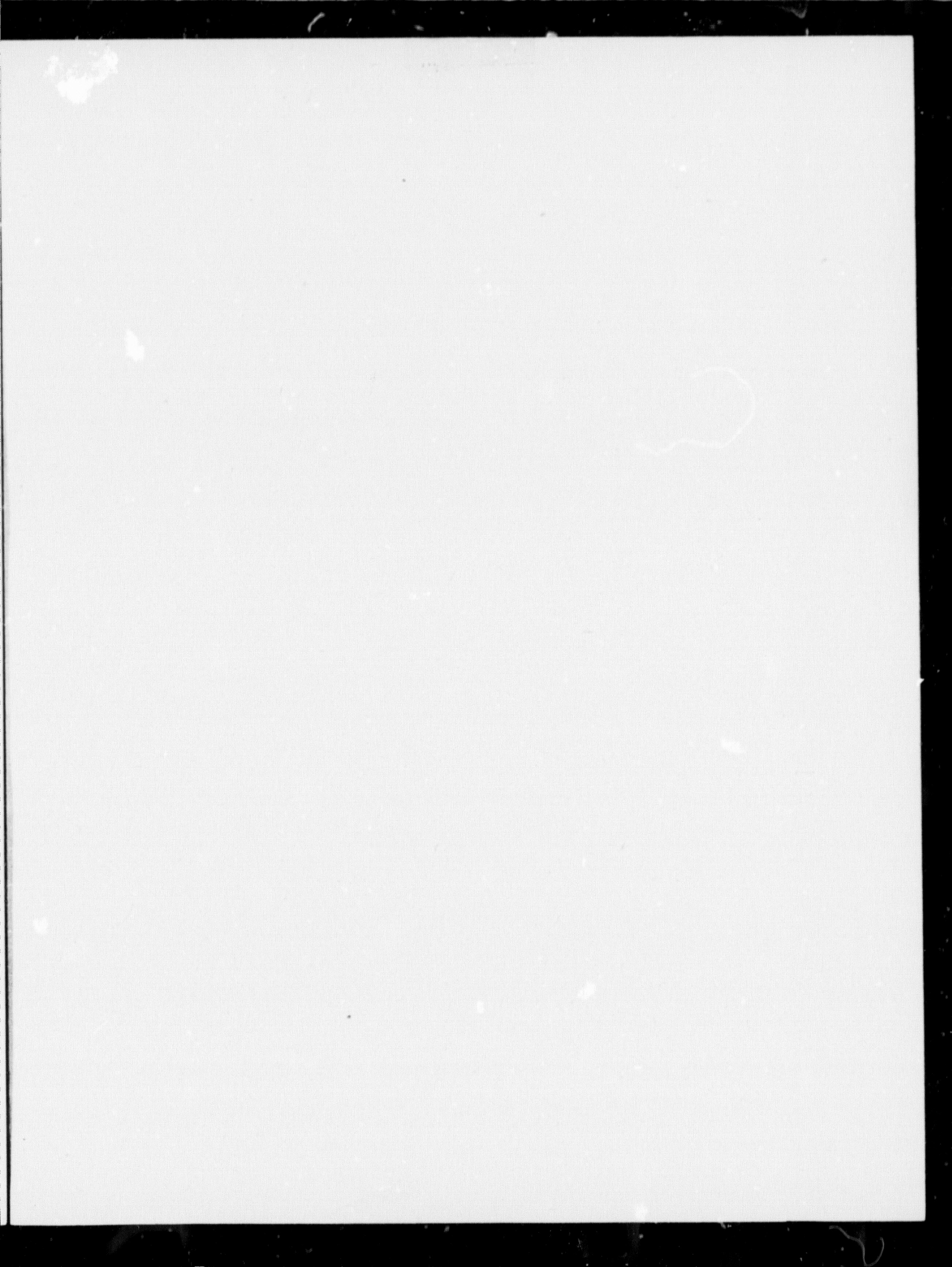
That from and after two years from the date of the approval of this Act no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than \$1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination, of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

* * *

Section 11(b), 15 U.S.C. § 21:

* * *

* * * If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being



violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act, if any there be, in the manner and within the time fixed by said order * * * .

* * *

The Federal Trade Commission Act

Section 5(a)(1), 15 U.S.C. (Supp. V)
§ 45(a)(1):

Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

* * *

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-4078

SCM CORPORATION, Petitioner,

v.

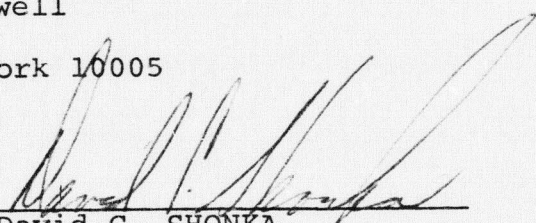
FEDERAL TRADE COMMISSION, Respondent.

On Petition to Review a Final Order of the
Federal Trade Commission

CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of July, 1977,
served the Brief for Respondent upon counsel for SCM by causing
two copies to be mailed by first class mail, postage prepaid, to:

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